Supreme Court, U.S.
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No. 98-295

In The

Supreme Court of the United States

October Term, 1998

SCOTT CARTER,

Petitioner,

vs.

DANIEL J. GOOD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF RUTHERFORD COUNTY; AETNA LIFE & CASUALTY COMPANY, SURETY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is political loyalty an appropriate requirement for the job of deputy sheriff in North Carolina?

STATEMENT PURSUANT TO RULE 29.6

Respondent Aetna Life & Casualty Company, now known as Travelers Casualty & Surety Company, has no nonwholly owned subsidiaries. The parent corporation is Travelers Property Casualty Company. Pursuant to a recent merger with CitiCorp, the parent company will become CitiGroup.

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STATEMENT OF THE CASE

For the most part, the respondents agree that the petitioner's "Statement of the Case" provides an accurate synopsis of the relevant facts of record under the caption "Factual Background" and an accurate summary of the decisions of the courts below under the caption "Proceedings Below." Rather than recast each element of the petitioner's Statement of the Case, the respondents will instead note the following areas of disagreement with that portion of his Petition:

A. Factual Background

- In an attempt to draw a narrow distinction between this case and the applicable legal authority, the petitioner attempts to recast the basis for his claims as actual speech in opposition to Sheriff Good. The allegations contained in the Complaint reveal, however, that the claims at issue in this case arise from the much broader contention that Sheriff Good fired Carter "because Carter supported Good's political opponent, John Smart." (J.A., p. 7, § 1)[1]

- The petitioner submits that his statement at a local Pizza Hut to on-duty officers, while wearing a "John Smart for Sheriff" hat, that he was "the only one with the balls to stand up to Sheriff Good and tell him who [he] supported" was the "primary factor" which motivated Sheriff Good to terminate him. (Pet., p. 6) The record reveals, however, that a pattern of misconduct and insubordination preceded the petitioner's termination:

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1. Consistent with the Petition, references to the Joint Appendix in the court below are designated J.A.

- Sheriff Good was informed in late 1993 that a confidential drug informant had complained that Carter contacted her and attempted to discuss matters related to drug investigations. (J.A., pp. 100-101, 154-159) In or about February of 1994, Sheriff Good learned that the drug informant had again complained that Carter contacted her and attempted to discuss matters related to drug investigations. (J.A., pp. 100-102, 190-191)

- Sheriff Good was informed that Carter had not been following the proper chain of command within his road patrol crew. (J.A., pp. 145-146, 234) On one occasion, a superior officer informed Carter that warrants needed to be served on a woman named Lena Buckner Tipton ("Tipton"). Carter was able to contact Tipton on the telephone, but would not tell his supervisor where she was. (J.A., pp. 112-114, 151, 211-212) Sheriff Good considered this conduct to be insubordination. (J.A., pp. 151)

- A woman named Trudy LeBrun arranged a meeting with Tipton at a funeral home in an attempt to facilitate the service of criminal warrants. LeBrun contacted the Sheriff's department and requested that an officer be dispatched to the funeral home to serve the warrants. Scott Carter was the officer who went to the funeral home. LeBrun later complained that Carter allowed Tipton to physically strike her and that when she finally retaliated, Carter pushed her to the ground and kicked her in the leg. (J.A., pp. 117-121, 151-153, 205-208)

Accordingly, Sheriff Good testified that, the petitioner's disloyal and disrespectful comment in the

Pizza Hut was merely "the straw that broke the camel's back after a long . . . series of events which was . . . just enough for [Sheriff Good] to terminate Mr. Carter . . . it was violations that [Sheriff Good] just didn't need going on in [his] department." (J.A., pp. 173-174)

- The petitioner implies that he had minimal supervisory responsibilities as a corporal in the sheriff's department. (Pet., p. 4) However, he testified that he was required to assume supervisory responsibilities "[q]uite regularly", and when he was supervising the shift at night, he was "the highest ranking official [on duty]." (J.A., pp. 56-57) While Carter was supervising the shift, Sheriff Good considered him "the direct extension of my policy and procedures, and . . . expected him to carry them out." (J.A., p. 137)

- The petitioner implies that his transfer to a jailer's position shortly before his termination was related to the Sheriff's purported warning to "stay out of politics." The record reveals, however, that Sheriff Good decided to transfer Carter to a jail assignment upon learning in February of 1994 that a confidential drug informant had again complained about Carter approaching her and asking about drug investigations. (J.A., pp. 168-170, 233) He did not demote Carter when he transferred him to the jail. (J.A., pp. 166-167, 169-170, 218, 233) When Sheriff Good and his Chief Deputy met with Carter to inform him that he would be transferred to the jail, Carter informed Sheriff Good for the first time that he intended to support John Smart for Sheriff. (J.A., pp. 64-65, 233) Carter testified that the Sheriff responded by telling him that it was his right to support whomever he wanted as long as he did it on his own time. (J.A., p. 72) It was only after this meeting that Carter started campaigning for John Smart's campaign for sheriff. (J.A., pp. 72, 74)

- The petitioner does not fully explain the sequence and timing of the events which followed Sheriff Good's decision to transfer him to the jail. When Sheriff Good notified Carter that he would be transferred to the jail, Carter requested vacation time to get his personal vehicle in working condition. (J.A., p. 73) It was while Carter was on vacation that he went to the Pizza Hut and told on-duty officers that he was the "only one with the balls" to tell the Sheriff whom he supported.[2]

- The petitioner notes that Sheriff Good's policy on political activities was consistent with N.C. Gen. Stat. § 153A-99(a), which serves "to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, and to ensure that public funds are not used for political or partisan activities. . . ." Section 153A-99(a), however, does not apply to deputy sheriffs. It is well-established under North Carolina law that deputy sheriffs are *not* employees of the county or the county board of commissioners. *Clarke v. Burke County*, 117 N.C. App. 85, 450 S.E. 2d 747 (1994). *Peele v. Provident Mutual Life Ins. Co.*, 90 N.C. App. 447, 449-50, 368 S.E. 2d 892, 894, *disc. rev. denied*, 323 N.C. 366, 373 S.E. 2d 547 (1988). In fact, under North Carolina law, a county board of commissioners has *no* authority to control the hiring, firing and supervision of a county sheriff's employees. *Peele*, *supra*; N.C. Gen. Stat. § 153A-103(a)(1).

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2. The sheriff was also informed, and reasonably believed, that Carter had distributed campaign literature to on-duty officers at Pizza Hut. (J.A., pp. 126-127, 171-172, 215-216)

B. Proceedings Below

- The petitioner incorrectly implies that the respondents have conceded that this case is not properly analyzed under the standards of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). When the respondents initially filed their Motion for Summary Judgment in the district court, they were constrained by the unduly narrow holding in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), that the *Elrod-Branti* "political patronage" analysis applied only to cases involving party affiliation. While the respondents' appeal was pending, however, the Fourth Circuit Court of Appeals rejected the narrow approach of *Jones* and applied the *Elrod-Branti* analysis more broadly to claims arising out of political loyalty. *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 881 (1998). The respondents submit that the court below correctly rejected the petitioner's claims under the *Elrod-Branti* standard as applied in *Jenkins*.

- The petitioner continues to emphasize the decision of the district court, which was reversed by the Court of Appeals and is not at issue before this Court.

- The petitioner gives short shrift to the well-reasoned analysis of the unanimous decision which he now asks this Court to review and the *Jenkins* decision on which it is based. In particular, he fails to acknowledge the fundamental basis for both decisions that:

> The circuits which have examined the interplay between the voters, the sheriff and his policies, and the role of deputies in the implementation of policy, have concluded that political affiliation and loyalty to the sheriff are appropriate job requirements. . . . [Our] examination of the role of deputy sheriffs leads us to conclude that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable. . . . **We do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.**

Jenkins, 119 F.3d at 1163-65 (citations and footnotes omitted, emphasis added).

REASONS FOR DENYING THE WRIT

The petitioner would have this Court review the unanimous panel decision of the Fourth Circuit based on an impossibly subtle and artificial distinction between political disloyalty and actual "speech" which demonstrates political disloyalty. The court below, however, recognized that the petitioner's claims raise the very concerns which *Elrod* and *Branti* address. Its decision is therefore consistent with this Court's jurisprudence and the Petition for a Writ of Certiorari should be denied.

A. The Court Below Properly Considered the Petitioner's Claims Under the *Elrod-Branti* Standard.

1. *The Opinion of the Unanimous Fourth Circuit Panel Is Not Contrary to this Court's Opinion in O'Hare*

The petitioner submits that the court below erred in applying the *Elrod-Branti* standard to his claims, because the basis for his dismissal was, at least in part, actual "speech." Relying on dicta in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353 (1996), he contends that any claim which arises, to any extent, from alleged retaliation for actual speech must be decided under the balancing test of *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) and *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 88 S. Ct. 173 (1968).[3] The petitioner's reliance on *O'Hare* for this proposition is misplaced. This Court did not need to address in *O'Hare* the question of which standard to apply, because "the Court of Appeals, based on its understanding of the pleadings, considered this simply an affiliation case . . ." subject to the *Elrod-Branti* standard. 116 S. Ct. at 2358. Instead, *O'Hare* focuses on whether the protections of the *Elrod-Branti* standard should also extend to independent governmental contractors.

To the extent that *O'Hare* is even relevant, it demonstrates the propriety of deciding the petitioner's claims under the *Elrod-Branti* standard. The plaintiff in *O'Hare*, like the petitioner in this case, claimed to have been terminated for actions which went beyond mere political affiliation. He also "supported the campaign of Paxson's opponent and displayed the opponent's

3. This is the reasoning of the dissent which the *en banc* majority rejected in *Jenkins*. The petitioner's contention amounts to a renewed attempt to have this Court review *Jenkins*, which it declined to do last term. 118 S. Ct. 881 (1998).

campaign posters at O'Hare's place of business." Even so, his claims were decided under the *Elrod-Branti* standard. The opinion of the unanimous panel of the Court of Appeals is therefore consistent with this Court's decision in *O'Hare*.

2. *The Petitioner's Claims Implicate the Very Issues Which Elrod and Branti Address*

A more appropriate and accurate analysis compares the essence of the petitioner's claims to the underlying purpose of the *Elrod* and *Branti* decisions. Although he now argues otherwise, the essence of petitioner's claims is that he was terminated because Sheriff Good elevated political loyalty to a job requirement for deputies in his department. In support of his claims, the petitioner has consistently offered evidence which, he contends, demonstrates that Sheriff Good had an unwritten policy requiring total political loyalty of his deputies. More specifically, the petitioner relies on evidence which (according to petitioner) shows: that the sheriff allowed campaign activities on his behalf even while on-duty; that the sheriff specifically told two deputies, "You don't have to work on [my campaign], but by the same token you can't work on anybody else's"; that the sheriff held a departmental meeting at which "[h]e warned everyone present that if [they] could not give him the loyalty that he demanded, then [they] should resign"; that a reserve officer was placed on inactive duty for supporting John Smart; and that two other deputies who did not contribute to the sheriff's campaign were not retained after the election. (Pet., pp. 4-5; J.A., pp. 34, 37-38, 47, 93, 130-131, 187-190, 217)

Simply stated, the petitioner's contentions raise the exact issue which *Elrod* and *Branti* directly address —

> [I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.

Branti, 445 U.S. at 517, 100 S. Ct. at 1294, *citing Elrod*, 427 U.S. at 366, 96 S. Ct. at 2686. Accordingly, the unanimous panel of the court of appeals properly examined the position of deputy sheriff under North Carolina law to determine whether " 'there is a rational connection between shared ideology and job performance.' " *Jenkins*, 119 F.3d at 1161, *citing Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990).

It is ultimately immaterial that plaintiff's First Amendment claim arises in part from actual "speech" in support of Sheriff Good's opponent. Drawing the fine distinction between political disloyalty and speech demonstrating political disloyalty which the petitioner urges this Court to consider would pose a nearly impossible challenge in cases such as this where the plaintiff claims to have been dismissed for political disloyalty which happened to include actual expression. The Second Circuit Court of Appeals addressed this issue and concluded:

> It would seem, then, that where such an employee's speech activities contributed to further interference with the discharge of his public duties, an employer should be no more constrained in acting against the employee than if the employee had remained silent. . . .
>
> > It would be a strange rule that gave more job protection to policymaking employees who vociferously attack their superiors than to policymaking employees who do

> their best to serve their superiors faithfully but have the misfortune to belong to the wrong party. It would give policymaking employees an incentive to attack their bosses in order to retain their jobs.

McEvoy v. Spencer, 124 F.3d 92, 101 (2d Cir. 1997), *citing Wilbur v. Mahan*, 3 F.3d 214, 218 (7th Cir. 1993).

Similarly, with regard to deputy sheriffs, the unanimous panel of the court below explained:

> "In some states a politically silent deputy would officially align with a party simply by voting in the primary election. This contrasts sharply with the politically active deputy who, by vociferously campaigning for the loser, encounters Matthew 26:52: 'All they that take the sword shall perish with the sword' ". . . . Thus, the *Elrod-Branti* analysis is not displaced merely because a deputy sheriff's opposition to a sheriff goes beyond mere party affiliation. Rather, as found in *Jenkins* and *Upton* [*v. Thompson*, 930 F.2d 1209 (7th Cir. 1991)] such analysis, grounded in the desire to protect a sheriff's interest in loyalty so that he may carry out electorally mandated policies, logically applies with even greater force where a deputy actively campaigns for the sheriff's political opponent.

App., pp. 7a-8a, *citing Upton*, 930 F.2d at 1218.

In short, the petitioner's contention that he was dismissed because he supported the sheriff's political opponent presents precisely the sort of claim which *Elrod* and *Branti* are intended to address. Contrary to the implication of his Petition, Scott

Carter is not entitled to greater protection merely because his political affiliation took the form, in part, of actual speech. The Court should decline the petitioner's invitation to consider an impossibly subtle and unworkable distinction between silent political affiliation and political affiliation which amounts to actual expression.

B. The Petitioner Overstates the "Conflict In The Circuits" Regarding the Applicable Standard.

The petitioner contends that this Court should issue a writ of certiorari to resolve a conflict in the circuits regarding the appropriate standard to apply to First Amendment claims of deputies who contend that they were terminated in retaliation for their political disloyalty. The petitioner's own authority reveals, to the contrary, that there is a developing consensus among the circuits to decide such claims under the *Elrod-Branti* standard. First, even the petitioner concedes that the standard which the Fourth Circuit Court of Appeals applied in this case is consistent with decisions in the First, Second and Seventh Circuits. *See e.g.*, *McEvoy*, 124 F.3d at 98-100 ("[W]here the lines between political association are often blurred, we conclude that adverse action may be taken against a policymaker because of political affiliation, even if the employer was also motivated in part by speech protected under *Pickering*."); *Rodriquez v. Munoz*, 808 F.2d 138 (1st Cir. 1986); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995).

Further, in *Burns v. County of Cambria, Penns.*, 971 F.2d 1015 (3rd Cir. 1992), the Third Circuit applied the *Elrod-Branti* standard to the claims of deputies who alleged that they were terminated for their failure to support the sheriff and/or their support of candidates who opposed him. Similarly, in *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), the Sixth Circuit applied the *Elrod-Branti* standard to deputies' claims, even though some

of the plaintiffs' political disloyalty took the form of actual expression. The United States Court of Appeals for the Ninth Circuit also applied the *Elrod-Branti* standard to similar claims in *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990).

Even the Fifth and Eleventh Circuits, on which the petitioner heavily relies, stop short of outright rejecting the *Elrod-Branti* standard. In *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995), the Fifth Circuit appears to apply both the *Elrod-Branti* and *Pickering-Connick* standards, noting that the heart of the *Elrod-Branti* test is whether political loyalty is an appropriate requirement for effective performance of the public office at issue and then proceeding to conduct a balancing of interests. Similarly, in *Morris v. Crow*, 117 F.3d 449 (11th Cir. 1997), the Eleventh Circuit acknowledged that

> Morris' complaint might be read to state a claim under both [*Pickering-Connick* and *Elrod-Branti*] theories. . . . Because Morris did not press an *Elrod/Branti* political patronage claim in the district court, we have no occasion to discuss the merits of such a claim under the facts of this case.

117 F.3d at 456.

In short, the decision of the Fourth Circuit in the present case is consistent with the developing consensus among the circuits to consider claims arising out of political disloyalty under the *Branti-Finkel* standard, even where the political disloyalty takes the form, in part, of actual expression. There is no conflict among the circuits to justify the issuance of a writ of certiorari.

C. Political Loyalty is an Appropriate Requirement for the Position of Deputy Sheriff in North Carolina,

The petitioner further contends that the Court should grant its Petition because the *en banc* majority's conclusion in *Jenkins* that political loyalty is an appropriate job requirement for a deputy sheriff in North Carolina, on which the unanimous panel relied in the present case, is in conflict with the decisions of other Courts of Appeals.[4] This contention disregards this Court's instruction in *Elrod* and *Branti* that an inquiry must be conducted on a case-by-case basis. *Elrod*, 427 U.S. at 367-368; *Branti*, 445 U.S. at 519.

Consistent with this Courts guidance, the courts of appeals have applied the *Elrod-Branti* standard by focusing on the particular position at issue to determine whether political loyalty or affiliation is an appropriate job requirement. *See e.g. Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990); *Brown v. Trench*, 787 F.2d 167 (3rd Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). When evaluating the position of employment, the "relevant inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved." *Brown*, 787 F.2d at 168.

Accordingly, the *en banc* majority in *Jenkins* thoroughly examined the role of deputy sheriffs in North Carolina in order to determine whether political loyalty is an appropriate requirement for the position. The *en banc* court noted:

> [Other] circuits have found that sheriffs, as elected officials, require loyal deputies to help them implement their policies — policies presumably sanctioned by the electorate. . . . The circuits which

4. Again, this contention is nothing more than an indirect attempt to have this Court review the conclusion of the *en banc* court in *Jenkins*, which this Court has already declined to do. 118 S. Ct. 881 (1998).

have examined the interplay between the voters, the sheriff and his policies, and the role of deputies in the implementation of policy, have concluded that political affiliation and loyalty to the sheriff are appropriate job requirements. . . .

Following the lead of the Seventh and Eleventh Circuits, we now consider the specific political and social roles of sheriffs and their deputies in North Carolina. The North Carolina legislature has declared that "[t]he offices of sheriff and deputy sheriff are . . . of special concern to the public health, safety, welfare and morals of the people of the State." The sheriff is such an important political figure, the legislature has prescribed a mandatory procedure for filling vacancies in that office: "If the sheriff were elected as a nominee of a political party, the board of commissioners shall consult the county executive committee of that political party . . . and shall elect the person recommended" by that party.

The North Carolina legislature has also recognized the special status of sheriffs' deputies in the eyes of the law: "The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff." The sheriff may not delegate final responsibility for his official duties, but he may appoint deputies to assist him. Our circuit and North Carolina state courts agree that the sheriff can be held liable for the misbehavior of the deputies. Presumably it is for these reasons that the legislature has made deputies at-will employees, who "shall serve at the pleasure of the appointing officer."

> This examination of the role of deputy sheriffs leads us to conclude that **in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable. We therefore hold that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the Elrod-Branti exception to prohibited political terminations. . . .**

119 F.3d at 1163-64 (citations and footnotes omitted, and emphasis added).

The petitioner points to decisions in which courts of appeals have found that political loyalty is not an appropriate requirement for the position of deputy sheriff in other jurisdictions. Under the case-by-case approach of *Elrod* and *Branti*, however, these cases are not relevant to the determination of whether political loyalty is an appropriate job requirement for North Carolina deputy sheriffs. Further, the Fourth Circuit is not alone in having found, under a particular state's law, that political loyalty is an appropriate requirement for the position of deputy sheriff. As the *en banc* court noted in *Jenkins*, both the Seventh and Eleventh Circuits reached a similar conclusion with regard to deputies in Illinois and Alabama, respectively. *See Upton*, *supra*; *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989).

The office of sheriff is uniquely a creation of state law. The relationship between the electorate, the sheriff and deputy sheriffs is similarly an issue of state law. The Fourth Circuit is in a better position than this Court to interpret North Carolina law. *See McMillian v. Monroe County*, 117 S. Ct. 1734 (1997). After thorough analysis of the status of deputy sheriffs under North Carolina law, the Fourth Circuit correctly concluded in *Jenkins* that North Carolina sheriffs may require political

loyalty of their deputies. The unanimous panel properly relied on that analysis in the present case. The purported "conflict" among the circuits as to whether political loyalty is an appropriate job requirement for North Carolina deputy sheriffs is illusory, and this Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

As the *en banc* court of appeals noted in *Jenkins*:

> In jurisdictions where the sheriff is elected by popular vote, the triumph of one candidate indicates voter approval of the candidate's espoused platform and general agreement with the candidate's "expressed political agenda." . . . By choosing a particular candidate to protect the citizens of the county, the electorate vests in the sheriff broad discretion to set and implement the policies necessary to carry out his goals. The sheriff owes a duty to the electorate and the public at large to ensure that his espoused policies are implemented.

119 F.3d at 1162. This analysis captures the essence of the issue at dispute in the present case. Plaintiff would have this Court establish a standard which would allow him greater leeway to derail the sheriff's policies, and consequently the mandate of the voters, merely because a certain portion of his political disloyalty took the form of actual expression. Such an artificial and subtle distinction would prove unworkable, futile and contrary to the interests of justice.

The unanimous panel of the court of appeals correctly applied the proper standard to the petitioner's claims, and this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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